In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

No. 269.

JOSEPHINE DESERANT, Administratrix of Henri Deserant, Jules Deserant and Henri Deserant, Jr.,
Plaintiff in Error,

AGAINST

CERRILLOS COAL RAILROAD CO.,
Defendant in Error.

Reply Brief of Plaintiff in Error.

It is much to be regretted that counsel are unable to agree in their attempts to state the facts disclosed by this record. It is to be deplored that counsel for defendant in error in their brief appear to question the good faith of our presentation of what we claim to be the facts and to suggest that we are attempting to deceive the Court and to obtain a reversal of this case by intentional misstatements of the evidence.

Our contentions are characterized as "untrue," "without foundation," "pure assumption," "mere guesswork," "fallacious," "disingenuous," "brazen," "deliberate misstatements," "pure surmise,' "unwarrantable, and untrue," "without justification," "wholly unjustifiable" and "puerile," all of which we take to be their method of conveying to the mind of the Court their respectful dissent from our various propositions. We feel that we are justified in declining

to reply, in kind, to this character of argument. Even in New Mexico we have learned that this Court considers the use of such expressions to be unseemly and that its rules require us to be " respectful " to opposing counsel. We, therefore, ask leave to deny generally any insinuations and suggestions of impropriety contained in brief of counsel for defendant in error, and to be permitted to verify by quotation from and references to the record, as best we may, those statements which counsel attack in such forceful language. We are persuaded that counsel need have no fear that this Court " will not examine the evidence " or that in this case the failure of the Court to examine the evidence will " enable the uncandid to profit by their disingenuousness."

The purpose of this reply brief is to facilitate such an examination and to bring to the attention of the Court some portions of the record which, in our opinion, support our contention as to the facts. Incidentally, but only incidentally, we shall attempt to meet the legal propositions advanced, and to show that some of our contentions as to the law of the case are apparently misunderstood by the learned counsel. We shall hope, also, to entirely eliminate some of the questions which are discussed at great length in the brief to which this reply is made.

We shall not review their extracts from the evidence, nor shall we attempt to impeach in any manner their statement of what they claim to be the facts, except to say that, in our opinion, an examination of the entire evidence, for which purpose it has been brought into this Court, will enable the Court without difficulty to readily resolve all differences between counsel as to the facts, without reliance upon statements of counsel for them.

I.

As to Alleged Misstatements by Us.

On page 39 of brief for defendant in error is said:

> "On page 9 of opponent's brief it is stated that 'no witness was produced who had seen the siphon working within a month of the explosion.' This is in a large sense untrue, as will be seen from the foregoing abstract."

On page 8 of their brief it is said:

> "The evidence tended to show that the siphon was running up to the time of the accident." * * *

Here is the evidence:
James Merchant, "Boss Driver," testified:

> "That the water from the fourth left air course, when it ran through the siphon pipe, ran down through room one of the fifth left and through the parallel slope to the bottom of the mine; that he thought the double shift was put to work about the first of the year, that he did not know when the water had run through the siphon pipe before the explosion; that to make the siphon run it was necessary to fill it with water and then the valves at both ends would be opened and the water would run out. * * * That he did not remember how much water had been hauled out within a week or ten days prior to the explosion." *(Trans., p. 43).* * * * "That there was very little water coming out near the time of the explosion on his shift; that some of the water was taken from the bottom of the mine and some from the sump near the sixth right; that the water coming out of the fourth left back-entry siphon ran to the foot of the main slope; that he was sure of that for the reason that they were not allowed to run that water down there for fear of drowning out the slope men. * * * That the siphon pipe was a two-inch pipe; that if any man started the siphon to running, and he went

by it or was anywhere near that pipe, he would know it was running, but if the pipe was started when he was in some other part of the mine he would not know anything about it. * * * That his orders were not to haul water when he could get coal. * * * That the lower end of the siphon pipe was on the fifth left main entry, and after the water emptied out of the pipe it ran away by itself ; that he could not remember when he had seen indications of the water having run there before the explosion " *(Trans., pp. 44 and 45).*

James C. Porterfield, mining engineer of defendant in error, testified :

" That he was working in room number seven of the second left entry at the time of the explosion ; that at some time within two hours he was at the siphon pipe and helped to carry water for a little while ; that he was pouring water in the stand pipe of the siphon and others were carrying the water ; that he had seen that pipe running before the explosion, but could not tell how long before ; that after the explosion he was at the lower end and turned on the valve and the siphon started running " *(Trans., p. 45).*

Philip Rolando testified :

" That, as far as he could remember, there had been a double shift at work in the mine for about a month before the explosion ; that after the mine was double-shifted there was a great deal less water hauled than before ; that after the mine was double-shifted his orders were to hoist water when he had no coal to take out ; that there was water made on both sides of the mine ; that he could not say how much water was taken out per day during January, or during the last week of January, or during the first, second or third week of February, *but he knew very little came out that month ;* that he knew nothing about what was done on the other shift " *(Trans., p. 46).*

It was part of the duty of this witness to haul water out of the mine.

J. W. Ray, night fire boss, testified :

" That on the 27th of January, 1895, there was water in the fourth left air course, but he could not say how much, and that from that time until the explosion that air course was never free from water ; that there was a siphon to drain the water out of that air course ; that he never knew it to run between the 27th of January, 1895, and the explosion ; that he could not tell how much water there was in there immediately prior to the explosion, but there was quite a quantity ; that it was somewhere around the neighborhood of between two hundred and three hundred feet in length ; that the accumulation of water was in his way a little in the discharge of his duties as fire boss ; that Donahue was the pit boss ; that shortly before the explosion he told Donahue that he had too much work to do, if he would take that water out of there it would shorten his run or else give him a man to hang canvas; *that Donahue told him his orders were to hoist no water,* but he would give him a man ; that this was probably four or five days or a week before the explosion *(Trans., p. 35).* * * * That as soon as he heard of the explosion he came to the mine and went down with Brown, pit boss, at the hard-coal mine to the fifth left, and came up through number one room to the fourth left air course and tried to get in there and encountered the water ; that they then went back to the fifth left and up the slope to the fourth left entry and put a brattice across the slope, turning the air into the fourth left entry ; *that he went into the water in the fourth left air course up to his armpits (Trans., p. 37).*

" That he had seen the pipe of the siphon in the fourth left back entry going around a sharp corner to go down the hill ; that, as well as he could remember, the siphon ran down through number one room of the fifth left ; that he did not know how far the pipe extended, but was once at its lower end after the explosion ; that before the explosion he had nothing to do with the pipe, and that it might have been running prior to the explosion, so far as he knew. * * * That if the air was not shut off in the back air course the mine would have been safe ; that if there had been sufficient air there would have been no gas ; that gas is lighter than air

and seeks the high places in the room; and before any gas could have filled room eight it would have spread through every room along the entire entry" *(Trans., pp. 40, 41).*

By James Kilpatrick, night foreman or pit boss, plaintiff in error offered to prove affirmatively that "for a considerable time prior to the explosion the means provided for removing the water from the fourth left air course was not kept in operation or employed for that purpose," but the Court, at the instance of defendant in error, excluded the evidence *(Trans., p. 121).*

John Hunt, boss driver on the night shift at the time of the explosion, testified at considerable length on the subject of hauling water out of the mine, but said very little about the siphon; we here quote only part of his testimony, but refer to pages 155 to 161, where his testimony will be found in full.

Hunt testified as follows:

"Q. Now, is it not a fact, Mr. Hunt, within your knowledge of the method of operating that mine, that, when that siphon pipe within the fourth left was running, the water had to be brought to the surface or it would go to the face of the slope and stop the work there? A. Yes, if it was never hauled out it would go to the face of the main slope.

"Q. Is it not also a fact that water was left in the fourth left? A. I don't know anything about it.

"Q. And not allowed to run down there because there was not time to haul all of the coal and all of the water? A. Not that I know of, sir.

"Q. There wasn't time to haul all the coal and all the water, was there? A. Well, I don't know how much water there was left.

"Q. You frequently had to leave water in the mine that ought to have been brought out because you didn't have the time? A. I never drained the sumps dry.

"Q. You frequently had to leave water in the mine that ought to have been brought out, because you did not have time to get it out, didn't you?

"A. Well, I should judge there was some left in these sumps; yes, sir.

"Q. And the only reason that it was left was that you did not have time to get it out?

"A. I guess so" *(Trans., pp. 156-7).*

On cross-examination Hunt testified:

"Q. Did you ever see the water come from the fourth left to the seventh left sump?

"A. Yes, sir.

"Q. When?

"A. I don't know; could not exactly say.

"Q. Had you seen it run within a month before the explosion?

"A. I could not say.

"Q. Could not say that you had, could you?

"A. Yes, sir.

"Q. That you had seen it running within a month?

"A. Oh, no; not that I had seen it running.

"Q. You had seen it running, but you don't know whether it was a month before the explosion or a longer time?

"A. Yes, sir" *(Trans., p. 159;* see, also, *pp. 160, 161).*

James Duggan, superintendent, testified in part as follows:

"Q. And you never inquired whether the siphon ran or not within those three or four months, did you?

"A. I knew it had run inside of three or four months.

"Q. Well, when did you know of its running last before the explosion? A. I don't remember.

"Q. You didn't see it running within a month before the explosion, did you? A. I might have and I might not.

"Q. Well, you don't know that you did, do you? A. I don't remember; I might and I might not.

"Q. Do you remember seeing it run after the first of January, Mr. Duggan? A. I don't remember now when I saw it run, with exception that it was within probably three or four months, but I knew I had seen it running during that time."

On page 40 of the brief it is said:

"The statement on page 12 that the slope leaked more than 60% before the air reached the bottom of it is pure assumption and mere guesswork."

Here is the evidence:

James Duggan, testifying as a witness for defendant in error, said:

> "A. We took air measurements on February 9th, 1895. The measurements were as follows: On the main intake I got 31,150 cubic feet of air going into the mine. On the first return on the 7th left we got 4,418 cubic feet per minute; on the 7th right we got 4,720 cubic feet per minute; on the first left we got 12,276 cubic feet per minute; on the first right we got 20,720 cubic feet per minute" *(Trans., p. 174).*

A simple mathematical calculation demonstrates our assertion.

At the main intake (the mouth of the slope) the air going in measured in cubic feet per minute	31,150
On the seventh left the air measured in cubic feet per minute	4,418
On the seventh right the air measured in cubic feet per minute	4,720
Total	9,138
Loss	22,012

or seventy per cent.

Our assertion is further verified thus:

On the last return, on the first left the air measured in cubic feet per minute	12,276
And on the last return, on the first right it measured in cubic feet per minute	20,720
Total air coming out of mine	32,996
Total going in	31,150
Gain	1,846

Which shows that the air, which was lost going down the slope, found its way into the return air courses—the increase being due to expansion caused by difference in temperature between the outside and inside of the mine (see testimony of Duggan, *Trans., p. 196).*

Another air measurement was taken on February 23d, 1895. This was three days before the explosion, and was on Saturday

evening after all work was finished in the mine, the doors closed and everybody out of the mine except the superintendent and the foreman *(Trans. p. 197)*. That measurement showed:

At the main intake the air going into the mine measured in cubic feet per minute		28,700
On the seventh left	5,202	
On the seventh right	4,000	
		9,202
Loss		19,498

or sixty-eight and six-tenths per cent. This measurement also demonstrates that on this occasion less air was coming out than was going into the mine, thus:

At the main intake there were going in		28,700
At the last return on first left there were coming out	12,012	
At the last return on first right there were coming out	12,656	
Total		24,668
Loss		4,032

Trans., p. 175.

An examination of the testimony of Mr. Duggan on page 196 of the transcript will show the significance of this fact. On page 41 of the brief it is said:

> "The statement on page 13 under the fourth head, that if there had been no obstruction in the fourth left air course there would have been no occasion to open a stopping to allow the air from the upper air course to pass to the men on the plane of the fourth left entry, is fallacious, for it will be remembered that after the air passed through the rooms in the fourth left main entry, and when it came to room six, after having passed room 8, it was split up, a large part of it going to the third left back air course and the other part being diverted into the rooms off the plane, and from thence back into room 1, and thence to the third left air course, so that those rooms off the plane would never have as much air as had passed through room 8."

Thomas Leaden, an experienced coal miner, a member of the New Mexico Legislative Committee, who examined the mine on behalf of that body, testified on this point:

> "That the air must be supplied to the people at the face of the entry before it could be supplied to the people working on the plane of the fourth left, *if it were going its right course*" *(Trans., p. 55).*

No witness attempted to contradict his testimony on this point. Kilpatrick, night foreman or pit boss, testified:

> "Q. Within two or three weeks before the time of the explosion did you know of any complaint from the men working on the plane about the condition of the air?
>
> "A. No, sir.
>
> "Q. Did you at any time during the month of February, 1895, know of an opening having been made through the stoppings in the upper-air course or the fourth left entry which would have the effect of increasing the supply of air to the men on the plane?
>
> "A. Yes, sir.
>
> "Q. Did you at any time during the month of February know of an opening from room 6 into the back-air course of the third left being stopped so as to turn the whole current of air down towards the plane instead of letting part of it escape through that opening?
>
> "A. No, sir, I never knew that it was entirely stopped at any time. One corner of the curtain was always open, a little of the canvas across the neck of that room where it went through.
>
> "Q. That opening through the stoppings in the upper-air course, did that remain open up to the time of the explosion, do you know?
>
> "A. Yes, sir" *(Trans., pp. 117, 118).*

This witness further testified on re-direct examination:

> "Q. In your cross-examination, Mr. Kilpatrick, you spoke about an opening supplying air to the plane rooms. I will ask you to state whether or not that opening in any way interfered with the circulation and conduct of the air up to the

face of the fourth left entry, and the rooms turned off that entry?

"A. No, sir" *(Trans., p. 128).*

John Deighton, day fire boss at the time of the explosion, testified on this point as follows:

"Q. Do you know anything about an opening on the upper air course to the plane, to let air in to the men on the plane, which did not go to the face of the works in the fourth left?

"A. I don't remember.

"Q. An opening in a stopping, a board knocked off there, ten days or two weeks before the explosion, in the upper air course on the fourth left, which would let air into the plane from the parallel air course?

"A. Will you allow me to look at the map?

"Q. Certainly.

"A. Yes, I remember a board being taken off there.

"Q. Why was it taken off, Mr. Deighton?

"A. To let air into the plane."

The evidence quoted, we think, warrants our contention on this point, and we submit that no attempt was made at the trial to explain why this opening became necessary ten days or two weeks before the explosion, or why it was permitted to remain until the explosion occurred.

If some condition, other than an obstruction in the air course, caused the necessity for this opening, why was not that condition shown? Why do not learned counsel point out some other explanation of it? It was certainly not the regular method of supplying air to the men on the plane, but we have no suggestion from our learned adversaries as to why this opening was made.

On page 41 of the brief it is said:

"The statement on the same page (13) that 'the evidence establishes beyond a reasonable doubt that the obstruction by water of the fourth left air course and the accumulation of gas in room eight of the fourth left entry combined to cause this awful calamity,' is as disingenuous as it is brazen in view of the unanimous finding to the contrary of the

> Supreme Court of the Territory and of all the evidence as shown by our abstract," etc.

It is true that the Supreme Court of New Mexico unanimously held that this is purely speculative and is not supported by the evidence, but is it either "disingenuous" or "brazen" to contend in this Court, that the Supreme Court was in error in this conclusion, so long as the contention is made in respectful langugage? That Court said in its opinion:

> "It cannot be positively proved what was the initial point of the explosion or what caused it."

We have brought the case here to obtain a review of that conclusion and insist that, that learned tribunal erred as to the legal effect of the evidence. It is true that the evidence is entirely circumstantial, but it is not for that reason, (or for any other, as we insist) legally insufficient. We admit that our evidence must show, with reasonable certainty, that the death of the intestates of plaintiff-in-error was caused by the negligence of defendant-in-error, and in what that negligence consisted; we utterly deny that we must produce an eye-witness to the explosion in order to satisfy the requirement of reasonable certainty, in our proof.

On page 42 of the brief it is said:

> "On page 15 of opponent's brief it is stated:
>
> "'On Sunday night Kilpatrick, the night foreman, found two men working in that room with a *safety lamp;*'- and it is said that 'it is difficult to understand why such a deliberate misstatement should be made.'"

Truly, indeed, it is difficult to understand why counsel intending to deceive the Court should refer to the very page of the transcript which would disclose the fraud. The idea intended to be conveyed was that, on Sunday night before the explosion, Kilpatrick knew that the air current in room 8 was bad; that he found miners at work there with a safety lamp at hand for the purpose of testing for gas (which is but another method of testing air) in order to protect themselves. It was not contended that they had not also the ordinary naked lights used by miners, but the presence of the safety lamp was the important fact intended to be called to the attention of the Court.

The reference to the transcript was unfortunate for us, because the point we were trying to make does not appear on the page cited, while the fact of the naked lights does. The reference should have been to pages 130, 131, of the transcript.

We extract the following from the testimony of Kilpatrick at the pages cited:

> " Q. Were they working with naked lights, or how ?
>
> " A. Yes, but where they had them, I don't know whether they had them in their hats or not. I know their their safety lamp was hanging on a prop and I took it off the prop " *(Trans., p. 130).*
>
> " Q. And so the men at work there had a safety lamp that night ?
>
> " A. Yes, sir.
>
> " Q. Did you give them that safety lamp or had they got it presumably from the fire boss ?
>
> " A. I didn't give it to them ; they got it from the fire boss; that would be the natural way for them to get it " *(Trans., p. 131).*

It is difficult to understand the mental operations of gentlemen who discover in this a willful misstatement or an intention on our part to deceive or mislead the Court.

On page 42 of the brief it is said :

> " The statement on page 19 that the evidence conclusively establishes that the explosion was caused by the ignition of gas in Room 8 of the fourth left entry of the mine is, in view of the evidence to the contrary set out in our abstract, unwarrantable and untrue."

On pape 12 of their brief we have the statement of counsel for defendant in error on this point ; it is :

> " It is manifest that if the explosion were caused by the ignition of a body of gas in room 8, that there being air in the lower part of the room and in the upper entry way adjacent, a combustion would have taken place between the air and the gas, generating a new gaseous body with such force, rapidity and volume that it *would have gone in the direction*

> *of least resistance* and certainly would have been felt the greatest in all parts of room 8 and in room 7, the adjoining room; and, as there would be a sudden expansion caused by the combustion, there would be immediately and as suddenly a contraction *causing a loud report.*"

Let us compare these two statements in the light of the evidence. No witness testified that an explosion of gas causes a loud report. No witness testified that the greatest force of a gas explosion would be felt in room 8 and in room 7, the adjoining room. No witness testified that the force of a gas explosion is expended in the direction of least resistance. The evidence is all directly to the contrary, so far as there is evidence.

Leaden testified

> " that a gas explosion does not make a loud noise; that, if the explosion had been occasioned by a gunning shot, the report of the gunning shot would have been loud, but if it was just a gas explosion it would be a kind of a dead sound." *(Trans., p. 57).*

Beck testified

> " that there was not at the time of the explosion any noise or report such as accompanies the explosion of gunpowder" *(Trans., p. 48).* "Also that he met after damp, which is a substance left in the air after a gas explosion, near room 13 of the third left entry and of the third left air course immediately after the explosion " *(Trans., p. 47).*

Fletcher testified

> " that gas explosions travel against the air " *(Trans., p. 88),* " while powder explosions expend their force in the direction of least resistance " *(Trans., p. 88).*

Alexander, a man of much experience with explosive gases, testified

> " that in his opinion the explosion was caused by the ignition of fire damp and that it originated in room number 8 of the fourth left entry " *(Trans., p. 51).* He also testified " that the greatest force of the explosion was, to the best of his recol-

lection, expended in rooms 16 and 17 or rooms 15 and 16" *(Trans., p. 52).*

Duggan testified that he would not expect to find in a gas explosion, pure and simple, indications of the greatest heat and violence at the place where it started, but very near to it, because the force would increase right shortly after it was ignited *(Trans., p. 205).*

On page 43 of their brief counsel say:

> "The statement on page 20 that there is no conflict between the witnesses on the first proposition—that there was a body of water in the fourth left air course which extended within three inches of the top—is without justification in the evidence. The only testimony to that effect was 'appearances of water mark' some time after the explosion had taken place, and, *therefore, more properly attributable to changes due to the explosion.*"

This is an inference of fact to be drawn from the testimony of the witnesses. No witness testified that the water mark referred to was "properly attributable to changes due to the explosion." On the contrary, Ray testified that "on the afternoon of the explosion he waded into the water in the fourth left air course up to his armpits, and could not get through it" *(Trans., p. 37).*

Merchant testified, immediately after the explosion, he, in company with others, "tried to get into the fourth left through the back entry [the air course], and they came to the water there and could not wade through it. We then came back and went into the top entry again and followed that until we passed the water that lay in the bottom entry [the air course], and then went through the crosscut back into the bottom entry and followed it as far as they could without being overcome by the after-damp; that he waded into the water up to his waist or a little deeper" *(Trans., p. 42).*

Alexander testified that "he was a member of the Coroner's Jury, and went into the mine a few days after the explosion with the other members of that body, accompanied by Mr. Fletcher, Mr. Duggan and another person whose name he thought was Ray:

> "That they traversed the fourth left back entry until they came to an obstruction, which was a body of water, which he

tried to go through and waded in until the water began to run over the tops of his boots and estimated that he was not half through when he turned and came out ; that the boots were wading boots, which came up twenty-six or twenty-seven inches ; that at the point where he turned to come back the entry appeared to be about four feet wide at the top " *(Trans., pp. 50 and 51)*; " that when they went around the water some one remained at the south end of the pool with a light, but he could not see the light directly over the water, but only the reflection of the light on the water, on account of the roof and the bottom of the entry forming a depression " *(Trans., p. 52)*.

Leaden testified that there was a fault in the air course which made a sag in both the top and bottom of the air course ; that after he went into the mine, after the explosion, Fletcher, Duggan, Brown and the Coroner's Jury went in ; * * * that Mr. Brown gave them all lamps ; that they went down to the fifth left ; went through the door and up through a room into the fourth left air course, and he went back along that course about 150 feet deep to the water, and Alexander walked into the water to the top of his boots, and then they returned and went up into the fourth left entry ; went past the water and came down in the air course, and Chambers held a light on this side and they saw the light across the water ; that where Alexander went in it was about three and one-half feet from his boots to the top ; that as Alexander waded in the water it was bound to get deeper, as it was a natural swamp, and he was on the upper edge " * * * *(Trans., p. 54)*.

He also testified " that there was a water mark on the low side of the air course which showed where the water had been, and was all along the low side of the air course about three inches from the roof ; that the air course was from five to five and one-half feet high and about nine feet wide, except at the fault, where it was about six feet " *(Trans., p. 53)*.

On page 43 of the brief it was said :

" The third proposition on page 21, that ' this body of water was allowed to accumulate because the appliances were not sufficient to take out all the coal produced to keep the mine free from water, has not the support of a scintilla of evidence and is wholly unjustifiable. The appliances, on the contrary, were

shown to be adequate and sufficient. It is difficult to understand why such unwarranted misstatements should be made. Can it be possible that, they imagine that if such misstatements be made, a court will not examine the evidence, but rest with the assertions that the evidence is sufficient to justify the statement,s and, therefore, conclude that there were sufficient conflict in the evidence as to the facts established to make the case one for a jury? Such a result would, indeed, enable the uncandid to profit by their disingenuousness."

Without attempting to quote the evidence *in extenso*, we submit that every witness—those for the defendant in error, as well as those for the plaintiff in error—who testified upon the point, agree that after the mine was double-shifted less water came out of the mine than before.

Ray testified "that Donohue told him that his orders were to hoist no water" *(Trans., p. 35)*.

Hunt testified "that his instructions were to hoist coal in preference to water, and that he only hoisted water when there was no coal to hoist" *(Trans., p. 155)*.

Rolando testified "that after the mine was double-shifted there was a great deal less water hauled than before. That, after the mine was double-shifted, his orders were to hoist water when he had no coal to take out" *(Trans., p. 46)*.

Merchant testified "that there was very little water coming out near the time of the explosion on his shift; that some of the water was taken from the bottom of the mine and some from sump near the sixth right; that the water coming out of the fourth left back entry siphon ran to the foot of the main slope; that he was sure of that for the reason that they *were not allowed to run that water down there for fear of drowning out the slope men*" *(Trans., p. 44)*.

On page 44 of the brief it is said:

> "Neither was there any evidence to justify the assertion on page 20 that the boy was blown through a door a distance of over seventy feet."

It must be admitted that no witness stated on the last trial of the case that "the boy was blown through the door a distance of over seventy feet," and it is probably true that the record does not

disclose with certainty where the boy's body was found. We must confess that in this particular our statement is inaccurate. We plead, in extenuation, the fact that this case was tried twice, and that upon the second trial some facts established on the first trial were assumed by both sides without controversy. Our recollection is that this was one of the facts which was thus assumed, but, as to that, we make no positive statement. If the statement is material to the Court's understanding of the case we are clearly convicted of error in regard to it.

As to the statement on page 42 of the brief:

> "On page 17, speaking of finding the bodies of Donahue, Flick and Kelly, it is stated: 'All three had the ordinary miners' lamps in their caps.' No page of the transcript is referred to, although immediately preceding a reference is made to paging as verification for other statements. After having carefully read all the testimony given, with a view of noting down the evidence on every material point, we do not remember of a single witness as having testified what kind of lamp there was in any of the caps of these three men when found after the accident, and no testimony was given to show what kind of lights they were using immediately before. The statement that they had the ordinary miner's lamps in their caps is, therefore, pure surmise."

We assert most positively that upon the second trial of the case there was no contention as to the character of the lights which were being used by Flick and Kelly and Donahue on the morning of the explosion. On the first review the Supreme Court of New Mexico, in its opinion, treated these facts as established and laid down certain rules of law as applicable thereto; upon the second trial the Court, in its charge to the jury, charged them as to the law of the case, based upon the ignition of gas by Flick and Kelly, and counsel for defendant in error asked two instructions involving the proposition that Flick and Kelly entered room eight with naked lights. The Supreme Court of the Territory upon the last review said:

> "The theory of the prosecution as to the cause of the explosion is the same now as then—to wit, that owing to an accumulation of water previous to the explosion in a low

> place in the fourth left air course a sufficient quantity of pure air was not going to the face of the workings in the fourth left entry to remove and expel the noxious gases; that Kelly and Flick, who were the company men—that is, men paid by the day and not according to what work they did—acting under instructions from Donohue, the day pit boss, went with him, or by his direction, into room eight to remove a railroad track, carrying naked lights, and that such lights set fire to the gas which had accumulated there by reason of the insufficiency of air and caused the explosion" *(Trans., pp. 276, 277).*

The questions propounded by counsel on each side of the case to the various witnesses show that they assumed that Flick and Kelly carried naked lights. Indeed, the whole record shows that the point was never in dispute on the second trial, and also that the use of safety lamps by any other persons than the fire boss was noticeable and exceptional in mining.

If there is no evidence upon which the jury could conclude that Flick and Kelly used naked lights on the morning of the explosion, instructions No. 6 and No. 11 given at the request of counsel for the defendant in error are clearly erroneous, because each of those instructions assumes that fact.

We have not attempted to set forth all of those parts of the brief of counsel for defendant in error in which our conduct is condemned and our motives questioned, for the reason that it would seem to be unnecessary to do so. We do not desire to be understood as admitting any statement made by counsel by reason of our failure to call attention to it in this reply brief, but we ask leave to direct the attention of the Court to the statement contained on page 108 of their brief as follows:

> "In the Supreme Court of the Territory there was only a general assignment that the Court erred in admitting improper evidence, or in refusing to admit proper evidence. For this reason, if no other, the alleged errors should not be considered."

The assignment of errors filed by us in the Supreme Court of New Mexico is made part of the transcript in this case and will be found on pages 266 to 270 inclusive, of the transcript. It there ap-

pears that the first ten assignments relating to the evidence are in the language used in the first ten assignments of error in this Court, found on pages 278 to 280 inclusive, of the transcript with the exception that the reference to the pages of the transcript are changed and after each assignment is added the words "and the Supreme Court of New Mexico erred in refusing and failing to consider such action in the District Court as erroneous."

II.

We admit that only errors, occurring at the trial, can be considered by this Court.

If we understand correctly the proposition attempted to be laid down in Point I. at the top of page 45 of the brief of counsel for defendant in error, it is that it is incumbent upon us to show that error of law intervened at the trial of this case in the District Court to entitle us to a reversal, and thus understood we admit it to its fullest extent. We assume in this Court the burden of showing not only that the reasons assigned, by the Supreme Court of the Territory, for its affirmance of the judgment of the District Court, were erroneous, but also the burden of showing that the result—the judgment of affirmance—is erroneous as matter of law.

If the record in the Supreme Court of the Territory disclosed no error on the part of the trial Court the judgment was properly affirmed, and it matters not that the reasoning by which that result was reached may have been erroneous.

If upon the whole case the facts disclosed by the record were legally insufficient to support a verdict in favor of the plaintiff in error in the trial Court, this Court will affirm the judgment of the Supreme Court, even though it may appear that errors were committed on the trial, because none of the other errors complained of were sufficiently prejudicial to the rights of the plaintiff in error to entitle her to a new trial, and a new trial would necessarily result in another verdict against her.

If, however, the evidence given on the trial, with the inferences which a jury may lawfully draw from it, was legally sufficient to

support a verdict in favor of the plaintiff in error, this Court should examine the entire record and all errors assigned (as well as any plain error not assigned, if any such there be) in order to determine whether or not error of law did intervene at the trial.

If the Supreme Court of the Territory reached a correct result, the reasoning by which that result was reached is not material. In no other sense do we contend that this Court can review the action of the Supreme Court of the Territory.

It is said on page 45 of brief for defendant in error that there are twenty-nine assignments of error made in this Court, and there were eighteen assignments of error in the Supreme Court of the Territory. This is a mistake ; there were twenty assignments of error in the Supreme Court of the Territory instead of eighteen, as stated. We attempted in the original brief to present the various assignments of error relied on, with our views in support of them, and we have no desire to add to what we have there said.

III.

We admit that we cannot succeed in this Court, if upon the evidence the cause of the explosion is mere matter of conjecture or speculation.

Counsel for defendant in error devote that part of their brief between pages 46 and 63 to an elaborate discussion of the proposition that, if the evidence, on the trial of a case like this, is so inconclusive as to render it impossible to say with reasonable certainty that the explosion was caused by the negligence of the defendant in error and that such negligence was the direct, proximate cause of the accident there can be no recovery. This proposition we admit. We admit it, however, with this qualification—namely, we insist that the evidence must, in order to be legally insufficient, be so inconclusive that all reasonable men will agree that it is impossible from the evidence to determine that the negligence of the defendant in error was the direct, proximate cause of the injury.

We admit that it is not sufficient to show that it is more probable that the injury was caused by the negligence of the defendant

in error than by a cause for which the defendant in error would not be responsible, but we insist that we have shown in this case facts from which the legal inference of negligence on the part of the defendant in error is irresistible.

(a) An accumulation of gas in room eight in the fourth left entry.

(b) An accumulation of water in the fourth left air course which, ten days or two weeks before the explosion, obstructed the circulation of air in the fourth left entry to such an extent as rendered necessary the opening of a stopping to let air in to the men on the plane of the fourth left entry.

(c) That the explosion was a gas explosion. (This proposition is established by the conditions found in the mine after the explosion; by the after damp which went up in the third left entry; by the fact that the explosion was unaccompanied by any noise or report, and, indeed, by every fact and circumstance in the evidence.)

(d) The discovery of the gas by fire boss of the defendant-in-error and failure to remove it, together with knowledge on the part of the day foreman of the existence of gas in room eight, and of the obstruction in the air course, and want of knowledge on the part of the intestates of plaintiff-in-error on these points.

We do not believe that circumstances like these can be overcome by the suggestion that it is impossible to tell what caused the injury, or that in any just sense, evidence of this character can be said to furnish no more than ground for speculation as to the cause of the explosion.

If there is in the case any point upon which there was a conflict of evidence, this Court will, of course, as to that point, and for the purpose of determining the legal sufficiency of the evidence, consider that the jury accepted the evidence of the witnesses for the defendant-in-error rather than our own, but we repeat our contention that there is no conflict between the witnesses as to any material point in the case, and that on the evidence taken as a whole, with the inferences which a jury can lawfully draw from it, a verdict for defendant in error cannot be allowed to stand.

If, however, this Court finds itself unable to agree with us to the full extent of our contention, that on the whole case a verdict for defendant in error cannot be allowed to stand, we yet submit that there was evidence legally sufficient to support a verdict in favor of the plaintiff-in-error, and that prejudicial error has been committed, which entitles the plaintiff-in-error to a new trial and to have the facts submitted to another jury, under proper instructions.

IV.

The intestates of the plaintiff in error did not assume the risk of an obstructed air course and accumulation of a dangerous body of gas in room eight of the fourth left entry.

The evidence conclusively establishes that the deceased had no knowledge of the accumulated gas in room eight or of the obstruction, by water, of the fourth left air course. It also establishes that they had no means of knowing of the existence of these conditions and we contend that the entire argument, pp. 63 to the top of page 95 in the brief, is met and overcome by the decisions of this Court in numerous cases cited and quoted from in our brief, especially the *Grand Trunk Railway Company vs. Cummings, 106 U. S. 701, and The Tex. & Pac. R. R. Co. vs. Archibald, 170 U. S. 672.*

V.

Section 6 of the Act of Congress relied on was not complied with by defendant in error.

On page 95 of their brief counsel say :

> " In the instructions of the Court the attention of the jury was directed to the provisions of an Act of Congress

approved March 3, 1891, 26 U. S. Stats. at Large, P. 1104, but no point was made upon this statute in plaintiff-in-errors' brief in the Territorial Supreme Court. *For the first time is the statute seriously urged in this court.* Neither is any count in the declaration in terms based upon such statute, it being nowhere alleged that the acts or neglect complained of were 'contrary to the form of the statute in such case made and provided,' *nor was any particular proof offered that the mine was of a depth of one hundred feet or more.*"

Taking the last sentence of this paragraph first we refer to the testimony of the witness Porterfield and to the map on file with the transcript.

Porterfield testified that he was acquainted with the mine at the time of the accident; that the fire boss necessarily traveled four miles and 2,066 feet to make an inspection of it, and the map on file shows that the main slope was about 3,000 feet deep. The depths of the excavation of the various entries were also given, and it is shown, according to the present recollection of the writer of this brief, that the fourth left entry was excavated a little more than eighteen hundred feet from the slope, while the fourth left air course was about 150 feet shorter; yet it is said that there was no *particular evidence* that the mine was of a depth of 100 feet or more.

Each declaration concludes with the words: "wherefore, an action hath accrued to the said plaintiff to recover damages from the said defendant in accordance with the form of the statute in such case made and provided."

This was intended by the pleader to refer to Territorial statute under which the actions were brought, but the language is clearly broad enough to include in its terms the Act of Congress as well, if it were necessary to plead the Act of Congress in the declarations, but the trial Court took judicial notice of the Act of Congress, and charged the jury as to its legal effect, and we did not at the time object and cannot now complain, as we could not in the Supreme Court of New Mexico, that the charge of the Court with reference to the Act of Congress was more favorable to the defendant in error than it should have been; the suggestion that we for the first time seriously urge the Act of Congress in this Court is novel to say the least.

An examination of the Act of Congress in question will disclose the fact that Section 6 is the only section which in any manner affects this case.

Plaintiff in error claims no right to recover damages from defendant in error for the violation of an Act of Congress. She seeks to recover damages for the wrongful death of her intestates and unless that wrongful death was in some manner connected with the violation of the Act of Congress she would have no concern about it and would not be heard to complain of its violation.

The Act of Congress is material in this way, and in this way only. In the absence of legislation the common law liability of defendant in error to use reasonable care to provide a reasonably safe mine is undoubted, but what would be a reasonably safe mine under all the circumstances of the particular case would be for determination by the jury, as a fact.

When Congress, in the exercise of its undoubted authority, enacted this act and said by section 6 that certain things should be done, the question of whether the failure to do the things required by this section would or would not be evidence of negligence (or negligence *per se)* ceased to be a question for a jury, and is determined as matter of law.

An examination of the cases, in Pennsylvania and elsewhere, cited and relied on by counsel for defendant in error will disclose the fact that the statutes under which those cases were decided differ materially from the act of Congress and that their reasoning is not applicable to the case at bar. We make no contention that the Act of Congress changes the common law rules with reference to fellow servants. Our contention is that the section in question points out certain things which the mine owner can neglect, only at his peril. If the mine owner neglects to do the things required in section six and no person is injured thereby, the only complaint of such neglect must come from the mine inspector or other official mentioned in the act, but if the mine owner neglects to do any one or more things prescribed by the section and injury results therefrom to any person, the person injured (and in case of death his personal representative under statute) may recover damages for such injury, and in such case the mine owner cannot be heard to say that the failure or neglect to do the things required created no liability.

Two questions arise: First, Were the requirements of section six of the act of Congress met in this case? Second, Was the failure to do any one or more of the things required by the act of Congress the proximate cause of the injury to the intestates of plaintiff in error?

If the first question be answered in the negative and the second in the affirmative, the liability of defendant in error is established. No violation, however, of the Act of Congress which was not the proximate cause of the injury to her intestates, would entitle her to recover.

In our view, the statute does not in any sense make the master the insurer against the negligence of fellow servants. It makes the master liable to the servant for the master's negligence, and, as is said in the Cummings case, if the negligence of the master contributes to the injury, the fact that the negligence of a fellow servant also contributed does not relieve the master from liability.

VI.

Unless the evidence taken as a whole is legally insufficient to support a verdict in favor of the plaintiff in error, the rulings of the District Court upon the evidence and upon the motion for a new trial are properly reviewable on this record.

We do not desire to add anything to what we have said in our first brief on these points, further than to say, as we said in our first brief, that if the conclusion of the Supreme Court of New Mexico is correct, and the evidence is, as matter of law, legally insufficient to support a verdict in favor of the plaintiff in error, she has not been prejudiced by the action of the trial Judge in his rulings upon the evidence and upon the motion for a new trial.

If, however, the evidence was not legally insufficient, and if this record properly shows that the trial Judge failed to exercise a legal discretion possessed by him in passing upon the motion for a new trial, we submit that, under the authority of the Clyde Maddox case and the other cases cited in our original brief, this constitutes error of law, for which plaintiff in error is entitled to a new trial. If, as seems to be the position in the Supreme Court in the Territory, plaintiff in error cannot recover in this case unless she can produce an eye-witness who saw the explosion start and can tell

from personal observation where and how it was occasioned, a new trial would avail her nothing, as it is admitted on all hands that every man who was in position to see this explosion, lost his life at the time it occurred, and no eye-witness can be produced.

We insist, with all deference, that the rule laid down by the Supreme Court of the Territory is not in accordance with settled legal principles, and that for that reason its judgment should be reversed.

Respectfully submitted,

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